

United States District Court  
Eastern District of California

Troy L. Nevels,

Plaintiff,

vs.

Cheryl Pliler, et al.,

Defendants.

No. Civ. S 03-1590 MCE PAN P

Findings and Recommendations

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Plaintiff is a prisoner proceeding without counsel on a claim that defendant John Mahew was deliberately indifferent to a dangerous condition of plaintiff's prison confinement. Defendant moves to dismiss upon the grounds plaintiff fails to state a claim upon which relief can be granted and failed to exhaust available administrative remedies. Plaintiff filed no opposition.

On a motion to dismiss pursuant to F.R.Civ.P. 12(b)(6), the court must accept plaintiff's allegations as true, read the

1 complaint most favorably to plaintiff, give plaintiff the benefit  
2 of every reasonable inference that appears from the pleading and  
3 argument of the case and dismiss the complaint only if it is  
4 clear that no relief could be granted under any set of facts that  
5 could be proved consistent with the allegations. Wheeldin v.  
6 Wheeler, 373 U.S. 647, 658 (1963); Retail Clerks International  
7 Association, Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746,  
8 754 n.6 (1963); Hishon v. King & Spalding, 467 U.S. 69, 73  
9 (1984). The court may consider documents attached to the  
10 complaint in evaluating a motion to dismiss. Parks School of  
11 Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

12 To state a claim under 42 U.S.C. § 1983, plaintiff must  
13 allege an identified person deprived plaintiff of a right secured  
14 to him by the Constitution or laws of the United States while  
15 acting under color of state law. West v. Atkins, 487 U.S. 42,  
16 48-49 (1988). To state a claim that the conditions of  
17 confinement constitute cruel and unusual punishment, plaintiff  
18 must allege facts showing that prison officers were deliberately  
19 indifferent to the need to provide "the minimal civilized measure  
20 of life's necessities," or posing risk of a harm "that is not one  
21 today's society chooses to tolerate." Helling v. McKinney, 509  
22 U.S. 25, 36 (1993); Wilson v. Seiter, 501 U.S. 294, 302-03  
23 (1991); Rhodes v. Chapman, 452 U.S. 337 (1981). A prison  
24 official is deliberately indifferent if he knows of and  
25 disregards an intolerable risk to inmate health or safety.  
26 Farmer v. Brennan, 511 U.S. 825, 837 (1994). "The official must

1 both be aware of facts from which the inference could be drawn  
2 that a substantial risk of serious harm exists, and he must also  
3 draw the inference." Ibid.

4 Plaintiff alleges that December 10, 2002, he fell in a  
5 flooded shower defendant Mayhew was responsible for maintaining.  
6 Plaintiff attached an administrative appeal alleging he fell when  
7 "a lot of soapy water pooled on the shower floor," and "[b]ecause  
8 the floor was not properly installed, the water doesn't drain.  
9 Which [sic] often results in that area of the tier flooding."  
10 Plaintiff also attached a fellow prisoner's declaration that the  
11 fellow prisoner notified staff the shower flooded December 8, 9  
12 and 10, 2002.

13 Defendant contends plaintiff's allegations are similar to  
14 the facts of Davidson v. Canon, 474 U.S. 344 (1986), in which the  
15 United States Supreme Court held that evidence a prison official  
16 took no action to protect a prisoner who expressed fear of attack  
17 by another prisoner because the official did not consider the  
18 situation serious and evidence a guard forgot to take action on  
19 the alleged threat established no more than negligence.

20 But accepting plaintiff's allegations as true and drawing  
21 all reasonable inferences in plaintiff's favor, defendant Mayhew  
22 knew the shower flooded regularly but took no action to protect  
23 prisoners against the obvious risk of harm.

24 I therefore find plaintiff states a claim.

25 Defendant contends plaintiff failed to exhaust available  
26 administrative remedies.

1 On a motion to dismiss for failure to exhaust available  
2 administrative remedies, the court may look beyond the pleadings  
3 and decide disputed facts. Wyatt v. Terhune, 315 F.3d 1108 (9th  
4 Cir. 2002). 42 U.S.C. § 1997e(a) provides that a prisoner may  
5 bring no § 1983 action until he has exhausted such administrative  
6 remedies as are available. The requirement is mandatory. Booth  
7 v. Churner, 532 U.S. 731, 741 (2001). The administrative remedy  
8 must be exhausted before suit is brought and a prisoner is not  
9 entitled to a stay of judicial proceedings in order to exhaust.  
10 McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002). Where a  
11 litigant requests leave to proceed in forma pauperis, suit  
12 commences when the request is granted. See 28 U.S.C.  
13 § 1915(a)(1) (court may "authorize commencement" of suit without  
14 prepayment of filing fee for person demonstrating inability to  
15 pay).

16 California prisoners may appeal "any departmental decision,  
17 action, condition, or policy which they can demonstrate as having  
18 an adverse effect upon their welfare." 15 Cal. Admin. Code  
19 § 3084.1(a). The regulations require the use of specific forms  
20 but contains no guidelines for grievance content. 15 Cal. Admin.  
21 Code §§ 3084.2, 3085 (designating use of CDC Form 602  
22 Inmate/Parolee Appeal Form for all grievances except those  
23 related to disabilities under the Americans with Disabilities  
24 Act, which are filed on CDC Form 1824, Reasonable Modification or  
25 Accommodation Request). Prisoners ordinarily must present their  
26 allegations on one informal and three formal levels of review.

1 15 Cal. Admin. Code § 3084.5. While presentation on the third  
2 level, the Director's Level of Review, exhausts the remedy for  
3 departmental purposes, 15 Cal. Admin. Code § 3084.1(a),  
4 inability to present allegations on any subsequent level exhausts  
5 available remedies for purposes of 42 U.S.C. § 1997e(a). Ngo v.  
6 Woodford, 403 F.3d 620 (9th Cir. 2005). Defendant has the burden  
7 of identifying the remedies that remain available. Ibid.

8 December 11, 2002, plaintiff submitted an appeal alleging,

9 On 12-10-02, I was using the upstairs shower in c-  
10 section when a lot of soapy water pooled on the floor  
11 and caused me to slip and fall in the shower. Because  
12 the floor was not properly installed, the water doesn't  
13 drain. Which [sic] often results in that area of the  
14 tier flooding. After the fall I was unable to get up  
15 due to injuring my back. In the ER, I was given a shot  
16 and prescribed pain medication.

14 Plaintiff requested compensation for "present and future pain and  
15 suffering" and requested the shower floor be repaired.

16 The appeals coordinator returned the appeal December 13,  
17 2002, directing plaintiff to attach the medical report, a  
18 specific form, and asking, "What type of appeal is this? Do you  
19 want the shower fixed. [sic] Compensation is not part of the  
20 appeals process."

21 December 22, 2002, plaintiff resubmitted his appeal, writing  
22 in section "D,"

23 I requested the 7219 (form) from medical records but my  
24 request was ignored. Since then I was seen in the E.R.  
25 again on 12-17-02 and 12-19-02 due to my back going  
26 out. On 12-19-02 I was admitted to the infirmary.  
Please disregard my request for compensation.

26 Plaintiff also wrote, "Yes, I want the shower fixed."

1 December 24, 2002, the appeals coordinator returned  
2 plaintiff's appeal stating, "Write in A&B Section Only."

3 December 27, 2002, plaintiff submitted an appeal on a new  
4 form alleging,

5 On 12-10-02, I was using the upstairs shower in C-  
6 section when a lot of soapy water pooled on the floor  
7 and caused me to slip and fall in the shower. Because  
8 the floor was not properly installed, the water doesn't  
9 drain. Which often results in that area of the tier  
flooding. After the fall I was unable to get up due to  
injuring my back. In the ER, I was given a shot for  
pain and prescribed pain medication.

10 Plaintiff requested "the shower floor to be repaired as soon as  
11 possible."

12 The January 9, 2003, response granted the appeal, notifying  
13 plaintiff the problem would be investigated and informing  
14 plaintiff could appeal to the first formal level of review if he  
15 was dissatisfied. Plaintiff did not appeal.

16 Defendant contends that since plaintiff did not pursue his  
17 appeal to the Director's Level of Review he has failed to  
18 exhaust.

19 Prison staff granted plaintiff's appeal and advised him he  
20 could appeal if he was dissatisfied. Insofar as plaintiff was  
21 dissatisfied because he wanted damages, the appeals coordinator  
22 informed him he could not obtain such relief in the appeals  
23 process. Defendant fails to identify any remedy that remained  
24 available to plaintiff. See Ngo. Plaintiff could not obtain  
25 relief on any subsequent level of review.

26 Defendant asserts plaintiff should have identified defendant

1 Mayhew in the administrative appeal. A prisoner's appeal  
2 suffices if the prisoner completes the form provided by prison  
3 officials. Butler v. Adams, 397 F.3d 1181 (9th Cir. 2005).  
4 Plaintiff explained his problem and requested action on the forms  
5 provided which did not require he identify any specific person.

6 For these reasons, I find plaintiff exhausted the remedy  
7 available through the California Department of Corrections.

8 Defendant's November 24, 2004, motion to dismiss should be  
9 denied and defendant should be given 30 days to answer the  
10 complaint.

11 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these  
12 findings and recommendations are submitted to the United States  
13 District Judge assigned to this case. Within 20 days after being  
14 served with these findings and recommendations, plaintiff may  
15 file written objections. The document should be captioned  
16 "Objections to Magistrate Judge's Findings and Recommendations."  
17 The district judge may accept, reject, or modify these findings  
18 and recommendations in whole or in part.

19 Dated: June 7, 2005.

20 /s/ Peter A. Nowinski  
21 PETER A. NOWINSKI  
22 Magistrate Judge  
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